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No. 08-1179

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

MICHAEL ROGERS and HULYA KAR,

Petitioners,

v.

ROYAL CARIBBEAN CRUISES LTD.
and M/V MONARCH OF THE SEAS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the Petition, where the Ninth Circuit's decision affirming the district court's enforcement of the parties' contractual mandatory arbitration provision in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), and its implementing legislation, 9 U.S.C. §§202-208 (the "Convention Act"), does not conflict with a decision of this Court or a Court of Appeals, and does not implicate an important question of federal law that has not been, but should be, settled by the Court.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Royal Caribbean Cruises Ltd. (which Petitioners erroneously refer to as "Royal Caribbean Cruise Lines") has no parent corporation, and there is no publicly traded company that owns 10% or more of its stock. *M/V Monarch of the Seas* is a cruise ship that is operated by Royal Caribbean Cruises Ltd.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
INTRODUCTION	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
REASONS FOR DENYING THE PETITION	5
I. There Is No Conflict Among The Circuits Or With A Decision Of This Court Regarding Application Of The Convention To Claims Brought Under 46 U.S.C. §10313.	5
II. The Federal Arbitration Act's Exemption For Seamen Employment Contracts Does Not Apply To The Convention Act.	13

Contents

Page

III. The 1983 Amendment To 46 U.S.C. §597 Does Not Trump The Convention Nor Exempt From The Convention Claims Brought Under §10313. 17

CONCLUSION 21

TABLE OF CITED AUTHORITIES

Page

Cases:

Bautista v. Star Cruises,
396 F.3d 1289 (11th Cir. 2005) 10, 11, 13

Carter v. Countrywide Credit Indus., Inc.,
362 F.3d 294 (5th Cir. 2004) 14

Castillo v. Spiliada Maritime Corp.,
937 F.2d 240 (5th Cir 1991) 5

Cook v. United States,
288 U.S. 102 (1933) 20

Florida Department of Revenue v. Piccadilly Cafeterias, Inc.,
__ U.S. __, 128 S.Ct. 2326 (2008) 17

Fourco Glass Co. v. Transmirra Products Corp.,
353 U.S. 222 (1957) 20

Francisco v. Stolt Achievement MT,
293 F.3d 270 (5th Cir. 2002) 6, 13

Green Tree Financial Corp. v. Randolph,
531 U.S. 79 (2000) 14

Haver v. Commissioner of Internal Revenue Service,
444 F.3d 656 (D.C. Cir. 2006) 19

Cited Authorities

Page

Lakos v. Saliaris,
116 F.2d 440 (4th Cir. 1940) 5

Larkins v. Hudson Waterways Corp.,
640 F.2d 997 (9th Cir. 1981) 12

Lim v. Offshore Specialty Fabricators, Inc.,
404 F.3d 898 (5th Cir. 2005) 7, 14

Lobo v. Celebrity Cruises Inc.,
488 F.3d 891 (11th Cir. 2007) 5, 6, 7, 8, 9, 11

McCreary Tire & Rubber Co. v. CEAT S.p.A.,
501 F.2d 1032 (3d Cir. 1974) 6

Monteiro v. Sociedad Maritima San Nicolas, S.A.,
280 F.2d 568 (2d Cir. 1960) 5

Ntakirutimana v. Reno,
184 F.3d 419 (5th Cir. 1999) 19

Posadas v. Nat'l City Bank of New York,
296 U.S. 497 (1936) 20

Rhone Mediterranee Compagnia v. Lauro,
712 F.2d 50 (3d Cir. 1983) 11

Scherk v. Alberto-Culver Co.,
417 U.S. 506 (1974) 10, 11

Cited Authorities

Page

Sedco v. Petroleos Mexicanos Mexican Nat'l Oil Co., 767 F.2d 1140 (5th Cir. 1985) 6

U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351 (1971) ..... *passim*

Velidor v. L/P/G Benghazi, 653 F.2d 812 (3d Cir. 1981) 5

Whitney v. Robertson, 124 U.S. 190 (1888) 19

Statutes:

Cal. Bus. & Prof. Code, §§17000 *et seq.* 2

Cal. Labor Code §§2698-2699.5 2

9 U.S.C. §1 13

9 U.S.C. §§202-208 i

46 U.S.C. §597 ..... 17, 18

46 U.S.C. §10313 ..... *passim*

46 U.S.C. §10313(f) 2

46 U.S.C. §10313(g) 2

46 U.S.C. §10313(i) 18, 19, 20

Cited Authorities

Page

Rules:

U.S. Sup. Ct. R. 10 1

Other:

Convention Act, Section 202 15

FAA, §1 ..... 16, 17

FAA, §2 16

Labor Code Private Attorneys General Act of 2004 2

Labor Management Relations Act, §301 7

21 U.S.T. 2517 8

INTRODUCTION

There are no "compelling reasons" warranting the exercise of certiorari jurisdiction over this action. *See* Supreme Court Rule 10. The Ninth Circuit's decision does not conflict with a decision from this Court or a circuit court, nor does it implicate an important question of federal law that has not been, but should be, settled by the Court.

The Petition merely rehashes arguments that have been rejected by every circuit court to have considered them, thus highlighting the lack of conflict and the non-existence of an important question of federal law that should be settled by the Court. The Petition also attempts to characterize the Ninth Circuit as having held that *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351 (1971) is no longer good law, and that all claims under 46 U.S.C. §10313 can be forced into arbitration. The Ninth Circuit did no such thing. The Ninth Circuit held only that where all the elements of the Convention are satisfied (Petitioners did not dispute on appeal that all the elements were satisfied), courts are required to compel arbitration and are not permitted, out of a parochial desire to protect seamen or for any other reason, to legislate or create an exemption from the Convention for claims brought under §10313.

There is no basis for the Court to exercise certiorari jurisdiction over this action.

STATEMENT OF THE CASE

Petitioners Hulya Kar and Michael Rogers filed their Verified First Amended Complaint[1] against Respondents Royal Caribbean Cruises Ltd.[2] and *M/V Monarch of the Seas* (collectively, "Royal Caribbean"). Ms. Kar and Mr. Rogers were employed by Royal Caribbean Cruises Ltd., and *M/V Monarch of the Seas* is a cruise ship operated by Royal Caribbean Cruises Ltd. that they allegedly worked aboard during the course of their employment.

The six-count Verified First Amended Complaint purported to state claims against Royal Caribbean for: (1) unpaid wages and penalty wages under 46 U.S.C. §§10313(f) and (g); (2) breach of contract; (3) unjust enrichment; (4) alleged violations of Cal. Bus. & Prof. Code, §§17000 *et seq.* (the "UCL"); (5) Cal. Labor Code §§2698-2699.5, Labor Code Private Attorneys General Act of 2004; and (6) declaratory relief.

Royal Caribbean filed a Motion to Compel Arbitration and to Dismiss First Amended Complaint, Or, Alternatively, To Dismiss The First, Fourth, and Fifth Causes of Action. Royal Caribbean also filed a memorandum of law and a declaration in support of the motion. As relevant here, the motion asserted that the

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1. The pleading was "verified" by counsel for Ms. Kar and Mr. Rogers.

2. The entity named as a defendant in the First Amended Complaint was "Royal Caribbean Cruise Lines." There is no such entity. The entity's correct name is Royal Caribbean Cruises Ltd.

Convention required the district court to enforce a mandatory arbitration provision contained in the collective bargaining agreement governing Ms. Kar's and Mr. Rogers's employment.

The district court granted Royal Caribbean's motion, and entered an Order compelling arbitration and dismissing without prejudice the First Amended Complaint (Pet. App. 34-51).

Ms. Kar and Mr. Rogers timely appealed the district court's order. The Ninth Circuit affirmed the district court's order (Pet. App. 1-33). The Ninth Circuit's decision is reported at 547 F.3d 1148. Ms. Kar and Mr. Rogers petitioned the Ninth Circuit for rehearing and rehearing *en banc*, and the Ninth Circuit denied those petitions (Pet. App. 52). Ms. Kar and Mr. Rogers timely filed their petition for a writ of certiorari.

STATEMENT OF THE FACTS

Ms. Kar worked as an assistant waiter aboard cruise ships operated by Royal Caribbean. Mr. Rogers claimed he worked as a cabin boy or stateroom attendant aboard cruise ships operated by Royal Caribbean, but Royal Caribbean has been unable to locate any records indicating that Mr. Rogers was ever employed by Royal Caribbean.

Ms. Kar and Mr. Rogers conceded that they signed employment agreements that governed their employment with Royal Caribbean, and that the employment agreements incorporated the terms of a collective bargaining agreement entitled "Agreement

Between Royal Caribbean Cruises Ltd. and Norwegian Seafarers' Union for Marine Officers and Deck and Engine Ratings and Riding Crew and Hotel Personnel Serving on Cruise Vessels Under The Royal Caribbean Brand" (the "CBA"). The CBA was negotiated at arms' length by Celebrity and Ms. Kar's and Mr. Rogers's union, the Norwegian Seafarer's Union (the "Union"), and the CBA was signed by Celebrity and the Union. The CBA contained a mandatory arbitration provision.

Ms. Kar and Mr. Rogers alleged that they were not paid all of the wages and overtime wages to which they were entitled under the employment agreement and the CBA. They also alleged that when they were paid, they were not paid on time. Although the claims pleaded in the Verified First Amended Complaint were subject to the mandatory arbitration provision contained in the CBA, which is also incorporated by reference into the employment agreements, Ms. Kar and Mr. Rogers chose to assert their claims in federal district court, and not in arbitration.

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Among The Circuits Or With A Decision Of This Court Regarding Application Of The Convention To Claims Brought Under 46 U.S.C. §10313.

In affirming the district court's Order that Ms. Kar and Mr. Rogers were required to arbitrate the claim they brought under 46 U.S.C §10313, the Ninth Circuit joined the Eleventh Circuit (the only other circuit to have considered this issue) in holding that if all the elements of the Convention and the Convention Act are satisfied – and if none of the recognized defenses to enforcement of the Convention and Convention Act are established – then courts must compel arbitration and are not permitted to exempt from the Convention and Convention Act claims brought under §10313. *See Lobo v. Celebrity Cruises Inc.*, 488 F.3d 891 (11th Cir. 2007).

In an attempt to create a conflict among the circuits, Ms. Kar and Mr. Rogers argue that the Ninth Circuit's decision conflicts with *Monteiro v. Sociedad Maritima San Nicolas, S.A.*, 280 F.2d 568 (2d Cir. 1960); *Velidor v. L/P/G Benghazi*, 653 F.2d 812 (3d Cir. 1981); *Lakos v. Saliaris*, 116 F.2d 440 (4th Cir. 1940); *Castillo v. Spiliada Maritime Corp.*, 937 F.2d 240 (5th Cir 1991).

None of those decisions involved arbitration, and none of them involved application of the Convention or the Convention Act, which means none of them addressed the issue of whether arbitration is required for claims brought under § 10313 when all the elements of the Convention and Convention Act are satisfied. It

is impossible for those decisions to conflict with the Ninth Circuit's decision because those decisions did not address arbitration or the applicability of the Convention and Convention Act.

In apparent recognition that those decisions did not involve arbitration or the Convention and Convention Act, Ms. Kar and Mr. Rogers argue that they nonetheless conflict with the Ninth Circuit's decision because they vest federal courts with "mandatory" jurisdiction over claims brought under §10313, and the Ninth Circuit's decision ignores such mandatory jurisdiction.

The fact that those decisions did not address the Convention and Convention Act is fatal to Ms. Kar's and Mr. Rogers's argument regarding "mandatory" jurisdiction because §10313 does *not* make the courts an *exclusive* forum for the claims, but the Convention *does* make arbitration the exclusive forum where all the elements of the Convention are met. Put another way, where, as here, all of the elements of the Convention are satisfied, it is *mandatory* for courts to compel arbitration. *See, e.g., Lobo*, 488 F.3d at 895 ("the Convention *compels* federal courts to direct qualifying disputes to arbitration") (emphasis in original); *Francisco v. Stolt Achievement MT*, 293 F.3d 270, 273 (5th Cir. 2002) (quoting *Sedco v. Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d 1140, 1144-45 (5th Cir. 1985)) ("'If [the elements of the Convention are met], the Convention *requires* district courts to order arbitration.'") (emphasis added); *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032, 1038 (3d Cir. 1974) ("The Convention forbids the courts of a contracting state from entertaining a suit which violates an agreement to arbitrate.").

In an attempt to create a conflict between the Ninth Circuit's decision and a decision of this Court, Ms. Kar and Mr. Rogers point to the Court's decision in *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351 (1971). As shown below, there is no conflict with *Arguelles*.

In *Arguelles*, the plaintiff-seaman was subject to a collective bargaining agreement that "provided a grievance procedure and for arbitration of disputed claims." *See Arguelles*, 400 U.S. at 351. The *only* issue the Court addressed in *Arguelles* was whether §301 of the Labor Management Relations Act (the "LMRA") required the seaman to submit his claim for unpaid wages and penalty wages to a grievance procedure and, ultimately, to arbitration. *See Lobo*, 488 F.3d at 894-95 ("At issue in *Arguelles* was to what extent, if any, the enforcement mechanism of the LMRA required the plaintiff-seaman to submit his statutory claim for wages to arbitration as provided in his collective bargaining agreement.").

The Court *did not* address in *Arguelles*, or even mention, the Convention and Convention Act. *See Lobo*, 488 F.3d at 895 ("The Court did not mention the Convention, much less its applicability to Arguelles' claim."); *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 907 (5th Cir. 2005) (in a decision addressing the applicability of the Convention, distinguishing *Arguelles* from situations involving the applicability of the Convention because "at issue in *Arguelles* was the duty to follow the collective bargaining grievance procedure under the LMRA, a statute and procedure absent here").

Indeed, the Convention "[e]ntered into force with respect to the United States of America [on] December 29, 1970." *See* 21 U.S.T. 2517. *Arguelles* was completely briefed by October 28, 1970, more than two months *before* the Convention went into effect. *Arguelles* was argued before the Court on November 12, 1970, more than one month *before* the Convention went into effect. The Court issued its decision in *Arguelles* on January 13, 1971, fifteen days *after* the Convention went into effect. Thus, the Court had no occasion or opportunity to address the Convention in *Arguelles*. *See Lobo*, 488 F.3d at 895 (because "the briefing and oral argument in *Arguelles* occurred prior to the implementation of the Convention" and "the opinion in *Arguelles* was issued only days" after implementation of the Convention, "we are convinced that the Court did not have the opportunity to consider the Convention in the context of Arguelles' claim").

Irrespective of why the Convention was not addressed in *Arguelles*, the fact it was not addressed is crucial because the underlying policy and goals of the LMRA – which formed the basis of the Court's decision – are markedly different than the underlying policy and goals of the Convention, especially in the context of enforcing arbitration provisions contained in international seamen employment contracts.

Specifically, at the core of the decision in *Arguelles* was the Court's finding that:

> Enforcement by or against labor unions was the main burden of s 301, though standing by individual employees to secure declarations of

> their legal rights under the collective agreement was recognized. Since the emphasis was on suits by unions against unions, little attention was given to the assertion of claims by individual employees and none whatsoever concerning the impact of s 301 on the special protective procedures governing the collection of wages of maritime workers. We can find no suggestion in the legislative history of the Labor Management Relations Act of 1947 that grievance procedures and arbitration procedures were to take the place of the old shipping commissioners or to assume part or all of the roles served by the federal courts protective of the rights of seamen since 1790.

See Arguelles, 400 U.S. at 355-56; *see also Lobo*, 488 F.3d at 895 (quoting *Arguelles*, 400 U.S. at 357) ("[T]he underlying basis of the Supreme Court's decision in *Arguelles* was the fact that there was nothing in the language or legislative history of the LMRA to indicate an intent to abrogate the statutory right to sue in federal court afforded by the Seaman's Wage Act." "The Court's rationale was clear: the LMRA simply addressed restrictions on the activities of labor unions; since the history of the LMRA 'is silent on the abrogation of existing statutory remedies of seamen in the maritime field, we construe it to provide only an optional remedy to them.'").

In contrast, the Court subsequently held in the context of the Convention that:

> The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.

See Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974).

Thus, while the LMRA focuses upon domestic suits by labor unions against labor unions, the goal and focus of the Convention is to encourage the enforcement of arbitration provisions contained in "international contracts" and to unify the standards used throughout the world in observing agreements to arbitrate. To apply *Arguelles* and its discussion of the LMRA here would subvert the policy underlying the Convention because it would require the Court to legislate or create an exemption from the Convention and Convention Act for certain claims brought by seamen.

Grafting such exemptions onto the Convention is not permitted because "to read industry-specific exceptions into the broad language of the Convention Act would be to hinder the Convention's purpose." *See Bautista v. Star Cruises*, 396 F.3d 1289, 1299 (11th Cir. 2005) (citing *Scherk*, 417 U.S. at 520 n.15). Thus, while a parochial desire to protect seamen trumped the

underlying policy of the LMRA in *Arguelles*, "[i]n pursuing effective, unified arbitration standards, the Convention's framers understood that the benefits of the treaty would be undermined if domestic courts were to inject their 'parochial' values into the regime." *See Bautista*, 396 F.3d at 1300; *see also Lobo*, 488 F.3d at 896 (quoting *Scherk*, 417 U.S. at 520 n.15) (implementation of the Convention is "'strongly persuasive evidence of congressional policy' in favor of uniform enforcement of arbitration agreements, despite the potential presence of parochial policies present in other parts of the U.S. Code").

More specifically:

> The delegates to the Convention voiced frequent concern that courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements.

See Scherk, 417 U.S. at 520 n.15; *see also Rhone Mediterranee Compagnia v. Lauro*, 712 F.2d 50, 54 (3d Cir. 1983) ("In other words, signatory nations have effectively declared a joint policy that presumes the enforceability of agreements to arbitrate. Neither the parochial interests of the forum state, nor those states having more significant relationships with the dispute, should be permitted to supersede that presumption. The policy of the Convention is best served by an approach which leads to upholding agreements to arbitrate.").

There is no conflict between the Ninth Circuit's decision and *Arguelles*. Where, as here, all the elements of the Convention are satisfied, arbitration is mandatory and there is no basis for carving out claims brought under §10313. If any element of the Convention is *not* satisfied, then courts are not required to compel arbitration for a claim brought under §10313.

Finally, in an attempt to create intra-circuit conflict, Ms. Kar and Mr. Rogers argue that the Ninth Circuit's decision in this action conflicts with its earlier decision in *Larkins v. Hudson Waterways Corp.*, 640 F.2d 997, 999 (9th Cir. 1981). There is no conflict between these decisions because although the Convention was in effect in the United States at the time the Ninth Circuit issued its decision in *Larkins*, the Convention was not addressed in *Larkins* and the Ninth Circuit addressed only *Arguelles*. Thus, the Ninth Circuit's decision in this action does not conflict with *Larkins* for the same reason it does not conflict with *Arguelles*: neither *Larkins* nor *Arguelles* addresses the applicability of the Convention to claims brought under §10313.

There is no conflict between the Ninth Circuit's decision and a decision from another circuit or this Court. The Petition should be denied.

II. The Federal Arbitration Act's Exemption For Seamen Employment Contracts Does Not Apply To The Convention Act.

The Ninth Circuit joined the Fifth and Eleventh Circuits in holding that the exemption for seamen employment contracts (the "Exemption Clause") contained in §1 of the Federal Arbitration Act (the "FAA") (9 U.S.C. §1) does not apply to the Convention Act. *See Stolt*, 293 F.3d 270 (5th Cir. 2002); *Bautista*, 396 F3d 1289 (11th Cir. 2005). The Fifth, Ninth, and Eleventh Circuits are the only circuit courts to have considered this issue.

Despite the unanimity among the circuits, Ms. Kar and Mr. Rogers nonetheless offer two reasons they believe this issue should be considered by the Court. First, they argue that a portion of the dissenting opinion written by Judge Noonan illustrates why the Exemption Clause should apply to the Convention Act. Second, they argue that the Fifth, Ninth, and Eleventh Circuits simply got it wrong. Neither argument is legally correct, and neither provides a "compelling reason" for granting the Petition.

With respect to Ms. Kar's and Mr. Rogers's *first* argument, they hold out a portion of Judge Noonan's dissent in which he wrote that he did not believe the Convention should apply because Ms. Kar and Mr. Rogers did not stipulate that they saw, read, or understood the collective bargaining agreement containing the arbitration provision, or that their attention was drawn to the arbitration provision.

As a threshold issue, this portion of the dissent is of no use to Ms. Kar and Mr. Rogers because it does not address – or even purport to address – the Exemption Clause, and whether it applies to the Convention Act.

Regardless, although Judge Noonan raised this issue in his dissent, Ms. Kar and Mr. Rogers did not allege in their Verified First Amended Complaint that they did not read, see, or understand the CBA, and they never presented any evidence to the district court – not even their own affidavits – saying they did not read, see, or understand it. If Ms. Kar and Mr. Rogers wanted to avoid enforcement of the arbitration provision on the basis that they did not read, see, or understand the CBA, then it was their burden to raise such an argument before the district court and to introduce evidence supporting the argument. *See, e.g.*, *Lim*, 404 F.3d at 905-06 (quoting *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 297 (5th Cir. 2004)) ("'there is a strong presumption in favor of arbitration and a party seeking to invalidate an arbitration agreement bears the burden of establishing its invalidity'"); *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 91 (2000) (noting "prior holdings that the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration"). They did not do so, however, thus the issue of whether they read, saw, or understood the CBA was not part of the record before the Ninth Circuit and forms no basis for granting the Petition.

Ms. Kar and Mr. Rogers also point to another portion of Judge Noonan's dissent, in which Judge Noonan wrote that under *Arguelles*, the Convention should not be used to require arbitration for claims

brought under §10313. Just like the other portion of the dissent they cited, this portion of the dissent does not help Ms. Kar and Mr. Rogers because it does not address the applicability of the Exemption Clause to the Convention Act.

Additionally, and as discussed above, *Arguelles* has no bearing upon the issues of whether the Convention applies to claims brought under §10313, and whether such claims can be carved out from the Convention. Judge Noonan did not cite any decisions – and there are none – in which all the elements of the Convention were satisfied, but a court held that the Convention did not apply to claims brought under §10313, or held that claims brought under §10313 can be exempted from the Convention, or declined to compel arbitration for a claim brought under §10313.

With respect to Ms. Kar's and Mr. Rogers's *second* argument, they contend the Ninth Circuit reached the wrong result. Even though the Ninth Circuit (like the Fifth and Eleventh Circuits before it) engaged in a comprehensive discussion regarding the inapplicability of the Exemption Clause to the Convention Act, Ms. Kar and Mr. Rogers make virtually no reference to the Ninth Circuit's reasoning and fail to explain why the Ninth Circuit's reasoning is supposedly incorrect.

Section 1 of the FAA defines "maritime transactions" and "commerce," and also contains a statement that nothing in the FAA applies to "contracts of employment of seamen," which latter statement is the Exemption Clause. Section 202 of the Convention Act provides that the Convention Act applies to agreements arising from relationships that are "considered as commercial,"

including, but not limited to, agreements described in §2 of the FAA. Section 2 of the FAA, in turn, describes provisions in contracts "evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction."

Ms. Kar and Mr. Rogers argue that the Exemption Clause is part of the definition of "commerce," which, according to them, means that seamen employment contracts are, by definition, not "commercial" or "considered as commercial," and do not "involv[e] commerce."

In its decision, the Ninth Circuit held that the Exemption Clause does not affect the definition of commerce contained in §1 of the FAA (Pet. App. 14-15). More specifically, the Ninth Circuit held that the Exemption Clause does not say that seamen and other transportation workers "are *not* engaged in commerce or that their employment contracts are not 'considered as commercial.'" (*Id.* at 14) (emphasis in original). "Instead, [the Exemption Clause] states that *even though* such workers are engaged in commerce and *even though* their employment contracts are considered as commercial, the FAA does not apply to them." (*Id.*) (emphasis in original). Put another way, the Exemption Clause does not define what is or is not defined as commerce or considered as commercial; it says only that the FAA does not apply to seamen employment contracts.

Ms. Kar and Mr. Rogers make no attempt to explain why the Ninth Circuit's reasoning is erroneous, and they cite no decisions suggesting the Ninth Circuit (or the Fifth and Eleventh Circuits) was wrong. They do cite

Florida Department of Revenue v. Piccadilly Cafeterias, Inc., __ U.S. __, 128 S.Ct. 2326, 2336 (2008), apparently for the proposition that the section heading of §1 has something to do with the effect of the Exemption Clause, but the section heading further proves the Ninth Circuit's point.

The section heading for §1 provides: "'Maritime transactions' and 'commerce' defined; exceptions to operation of title." That was exactly the Ninth Circuit's point: §1 contains a definition of "commerce," and – as shown by what appears after the semicolon in the section heading– §1 also contains an independent "exception to operation of title" (the Exemption Clause). That exception has nothing to do with the statutory definition of commerce, and says only that nothing in the FAA applies to seamen employment contracts.

The issue of the inapplicability of the Exemption Clause to the Convention Act does not present a "compelling reason" for granting the Petition, and the Petition should be denied.

III. The 1983 Amendment To 46 U.S.C. §597 Does Not Trump The Convention Nor Exempt From The Convention Claims Brought Under §10313.

Ms. Kar and Mr. Rogers argue that under the "last in time rule," amendments that were made in 1983 to the predecessor to §10313 trump the Convention, and the Ninth Circuit's decision ignores that those amendments have trumped the Convention. Ms. Kar and Ms. Rogers are wrong as a matter of law, and their argument does not provide a "compelling reason" for granting the Petition.

The predecessor to §10313(i) was 46 U.S.C. §597 which, in relevant part, provided "the courts of the United States shall be open to such seamen for its enforcement." In 1983, Congress amended portions of the Seaman's Wage Act and, in doing so, moved that portion of §597 into a new section, §10313(i), and changed the language to read (as it currently reads) "[t]he courts are available to the seaman for the enforcement of this section."

Thus, the 1983 amendment (a) moved a portion of §597 into a new section, §10313(i), (b) made state courts available to seamen, whereas only federal courts were available under §597, and (c) relaxed the "shall be open to such seamen" language of §597 to the "are available to the seaman" language found in §10313(i).

Ms. Kar and Mr. Rogers argue that this amendment – which occurred thirteen years after the Convention was implemented – trumps the Convention and exempts from the Convention claims brought under §10313. Their position is that Congress – wanting to make clear that the Convention does not apply to claims under §10313 – chose the 1983 amendment to §597 as the vehicle to exempt such claims from the Convention and, in order to make sure everyone was keenly aware of the exemption, decided to make the exemption clear by saying only "[t]he courts are available to the seaman for the enforcement of this section." This argument fails for at least two reasons.

First, the argument is premised upon the "last in time" rule, under which *if* there is a *conflict* between a

treaty and a later enacted statute, then the later enacted statute controls. Specficially,

> When [a statute and treaty] relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the last one in date will control the other.

See Whitney v. Robertson, 124 U.S. 190, 194 (1888); *see also Haver v. Commissioner of Internal Revenue Service*, 444 F.3d 656, 658 (D.C. Cir. 2006) (quoting *Whitney*, 124 U.S. at 194) (same); *Ntakirutimana v. Reno*, 184 F.3d 419, 426-27 (5th Cir. 1999) ("if a statute and treaty are inconsistent, then the last in time will prevail"). If there is no conflict between a treaty and a statute, then the last in time rule never comes into play.

Here, there is no conflict between the Convention and §10313(i). If all the elements of the Convention are satisfied, then a claim under §10313 must be sent to arbitration. If, however, any one of the elements is not satisfied, then §10313(i) makes state and federal courts available to seamen to pursue claims under §10313. Ms. Kar's and Mr. Rogers's argument fails at the threshold because there simply is no conflict between the Convention and §10313(i), and effect can be given to both authorities quite easily.

Second, in order for the 1983 amendment to be treated as having modified, changed, or partially repealed the Convention so as to make the Convention inapplicable to claims under §10313, there must be a

clear expression of Congressional intent to that effect. *See, e.g., Cook v. United States*, 288 U.S. 102, 120 (1933) ("A treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed."); *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 227 (1957) ("For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed."); *Posadas v. Nat'l City Bank of New York*, 296 U.S. 497, 503 (1936) ("The cardinal rule is that repeals by implication are not favored" and "the intention of the legislature to repeal must be clear and manifest").

Here, there is absolutely nothing in the legislative history of the 1983 amendment – or in any other authority – clearly expressing an intent by Congress to make claims under §10313 exempt from the Convention. Indeed, and not surprisingly, Ms. Kar and Mr. Rogers have not cited to any such clear expression of Congressional intent. There is *only* the language of §10313(i) – "[t]he courts are available to the seaman for the enforcement of this section" – and nothing in that language expresses a clear intent by Congress to make the Convention inapplicable to claims under §10313.

The 1983 amendment does not trump or otherwise make the Convention inapplicable to claims under §10313. The Petition should be denied.

CONCLUSION

For these reasons, Ms. Kar's and Mr. Rogers's Petition should be denied.

Respectfully submitted,

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